LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 25 1969
JOHN F. DAVIS, CLERK

No. 511

Supreme Court of the United States

OCTOBER TERM, 1969

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME ACKERMAN
WILLIAM H. ALLEN
Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street
Washington, D. C. 20006

AUGUST 1969

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	10
Conclusion	23
Appendix	1a

TABLE OF CITATIONS

Cases:

American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965) .. 13
Boston Herald-Traveler Corp. v. *NLRB*, 223 F.2d 58 (1st Cir. 1955) .. 16
Curtiss-Wright Corp. v. *NLRB*, 348 F.2d 61 (3d Cir. 1965) .. 16
Decaturville Sportswear Co. v. *NLRB*, 70 LRRM 2472 (6th Cir. 1969) .. 19n
Morrison v. *California*, 291 U.S. 82, 88-91 (1934) .. 17
NLRB v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956) .. 3, 11, 12, 15, 18, 20
NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956) .. 11
NLRB v. *United Steelworkers (NuTone)*, 357 U.S. 357 (1958) 18
NLRB v. *Woolworth Co.*, 352 U.S. 938 (1956) .. 11
NLRB v. *Wyman-Gordon Co.*, 37 U.S. Law Week 4370 .. 12
Scofield v. *NLRB*, 394 U.S. 423 (1969) .. 13
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1950) .. 3, 15, 20

Supreme Court of the United States

OCTOBER TERM, 1969

No.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The decision and order of the National Labor Relations Board is not yet reported; it is reprinted in the appendix to this Petition (App. 1a). The decision of the United States Court of Appeals for the Second Circuit is not yet reported; it is reprinted in the appendix to this Petition (App. 15a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 28, 1969 (App. 35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 2857(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(5) of the National Labor Relations Act, as amended, provides as follows:

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."

Section 8(a)(1) of the National Labor Relations Act, as amended, provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other material aid or protection, and shall also have the right to refrain from any or all such activities. . . ."

QUESTIONS PRESENTED

1. Does an employer's duty to bargain in good faith include an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union for use by the union for organizational purposes in order to enhance the union's bargaining power?

2. Is such a list of home addresses presumptively relevant to collective bargaining or contract administration so that no specific showing of relevance is required in order to impose a duty to furnish upon an employer?

3. Was the standard used by the court below in determining adequacy of alternative channels of communication available to the union for communicating with non-members about collective bargaining or contract administration matters consistent with the standard established by this Court in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956)?

4. Was the application by the court below of the substantial evidence test consistent with *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950)?

STATEMENT

The Prudential Insurance Company of America (herein referred to as Prudential) is engaged in the business of selling and issuing life insurance, health insurance, group insurance and annuity contracts. Prudential does business throughout the United States. The Insurance Workers International Union, AFL-CIO (herein referred to as the Union) is the collective bargaining representative of District Agents (sometimes herein referred to as District Agents, Agents, or bargaining unit employees) employed by the Company in thirty-four states, the District of Columbia, and the City of Toledo, Ohio. As of December 1967, Prudential employed approximately 16,795 District Agents within the bargaining unit. This number has not varied appreciably over the last 10 years.

The Union has been the collective bargaining representative of Prudential's District Agents since 1959,

during which time five consecutive collective bargaining agreements have been negotiated. The present Union succeeded two predecessor unions through merger. Prior to 1959, Prudential bargained collectively with those unions—the National Federation of Insurance Agents' Council and the Insurance Agents' International Union. Between 1949 and 1959 four consecutive collective bargaining agreements were negotiated with these predecessor unions.

Within the area covered by the collective bargaining agreement, Prudential's operations are divided geographically into 478 districts, with a district office located in each district. In 228 districts, Prudential also maintains one or more detached offices, which are administratively related to the district office for the district in which they are located. As of December 1967, Prudential maintained approximately 419 detached offices. The number of district and detached offices has not varied materially since 1959.

The number of District Agents which operate out of each district and detached office varies within the collective bargaining unit, but on the average approximately 19 District Agents report to each district or detached office.

The Union has 178 local organizations in the area encompassed by the collective bargaining agreement, and substantially all of Prudential's district and detached offices within the bargaining unit are within the jurisdiction of some one of the local union organizations. The Union locals have membership meetings monthly, every three months, or less frequently when authorized by the Union's Executive Board. The Union pursues no general practice of inviting or not

inviting nonmember Agents to attend these local union meetings.

District Agents are normally required to report to their district or detached office on Tuesday and Friday of each week at 8:30 a.m. On Tuesdays, the Agents remain at the office for approximately one and one-half to two hours, and on Fridays, the Agents remain at the office for approximately two and one-half to three hours, during which time they work on business records pertaining to their territory and attend meetings.

In addition to the regular twice-a-week reporting schedule, a half-day training session is regularly scheduled for new District Agents during the first year of their employment. New District Agents are trained by or under the supervision of District and Staff Managers according to a program established by Prudential.

Prudential has never had a policy or practice, either through publications, meetings or otherwise, of attempting to impart to or indoctrinate its District Agents with Prudential's labor-management relations policies or philosophy. Managers are instructed not to initiate any discussion of labor-management relations matters with any District Agent. However, managers have authority to advise trainees and Agents of the representative status of the Union, and that they are free to join or not as they wish.

If an Agent inquired as to whether a Union represents Prudential Agents, he would be informed of the representative status of the Union. Moreover, if an Agent requested a copy of the collective bargaining agreement, he would be given one. Prudential normally communicates with its District Agents only at

the district or detached office to which they report. Prudential's various publications are distributed to Agents at the district and detached offices. To facilitate communication, Prudential maintains in its district and detached offices one, and in some cases two, bulletin boards upon which office managers place materials relevant to the Agents' work. But no materials relative to Prudential's position on any labor-management relations matters are placed on any Company bulletin boards.

Under collective bargaining agreements entered into between Prudential and the Union, the latter has been entitled to place bulletin boards in each district and detached office within the collective bargaining unit, to have a grievance committee in each district, and to the check-off of union dues. In addition, District Agents are permitted a specified amount of time off without loss of compensation for union business, and to attend union meetings, and conventions. In each contract negotiation, Prudential and the Union have bargained collectively with respect to Union requests for a union shop or maintenance of membership provision, but no such provision has been included in any of these collective bargaining agreements.

Although every collective bargaining agreement since 1949 has granted the Union the right to place and maintain bulletin boards in every district and detached office within the unit, the Union has elected to exercise this right in only 65 percent of Prudential's offices. Of the 305 district and detached offices in which the Union has not placed a bulletin board, at least 105 of these offices have one or more Agents who are dues paying members of the Union.

In offices where the Union has no Agents on check-off, the Union has the same right to place a bulletin board. The Union may and has utilized such bulletin boards by making mutually convenient arrangements for doing so with Prudential. However, the Union has bulletin boards in only 21 of these offices. In the remaining 200 offices with no Agents on check-off, the Union has made no attempt at communication through the use of bulletin boards.

In offices in which the Union has placed bulletin boards, the boards are approximately 18 inches by 24 inches in size and are located in the room utilized by district agents in the conduct of their work. Union bulletin boards are readily visible and accessible to District Agents.

Under the collective bargaining agreements, the Union has been and is entitled to have in each district a grievance committee consisting of not more than three District Agents. A district may include one or more detached offices at varying distances from each other and the composition of the district grievance committee may be changed by the Union at any time, or from time to time. Thus the composition of the district grievance committee may be changed from office to office within the district as the Union deems necessary or appropriate for the administration of the contract. The designation of district grievance committees or changes therein is solely an internal union matter. Prudential has never challenged the composition of any grievance committee in any district or detached office.

The Union has elected not to designate a grievance committee in any of the 221 district and detached offices

in which there are no Agents on check-off. In offices where there is a grievance committee, during the last nine years a total of approximately 6,617 grievances have been filed by the Union.

As of December 1967, approximately 9,702 District Agents had authorized the check-off of union dues under the applicable collective bargaining agreement. Between 1959 and 1967 the number of District Agents who have authorized the check-off of union dues has increased, as has the number of district and detached offices in which one or more District Agents have authorized the check-off of union dues.

As of December 1967, 87.6 percent of the District Agents within the collective bargaining unit reported to a district or detached office in which one or more Agents had authorized the check-off of union dues.

On several occasions, the Union has distributed literature to Agents around the Company's district and detached offices. The Union has, however, elected not to utilize this method of communication on a regular or frequent basis.

Despite the fact that the Union has a complete mailing list of all District Agents who are members of the Union, the Union uses this mailing list an average of only twice a year, except in the case of the union newspaper which is sent to members monthly. The Union has the names and addresses of approximately 150 nonmember Agents but does not mail either the union newspaper or other communications to these Agents.

At various times in 1960, the Union requested that it be supplied with a list of names and addresses of Agents within the collective bargaining unit. Such a list was purportedly necessary, the Union said, "to enable us to accomplish effectively our responsibilities

as the bargaining agent, and to bargain effectively for our next contract." In reply, Prudential stated that it was against Company policy to furnish any organization a list of employee names and addresses, and that the Union was no exception. Moreover, Prudential indicated that the collective bargaining agreement contained provisions under which the Union had reasonable means of communication with bargaining unit employees.

Subsequent to this request, in 1964-65 the Union instructed its local officials in district and detached offices to assemble a list of nonmember Agents' names and addresses. Although contract negotiations were pending the Union's stated purpose in requesting such a list from its Office Chairmen was not to enable the Union to communicate with nonmembers in connection with collective bargaining or to obtain their preferences on contract terms, but rather to enable the Union to try to enroll these Agents in the Union. In 1965-66 the Union continued to ask local unions to compile and submit lists of nonmember Agents. Again, however, these lists were solicited, not for the purpose of facilitating collective bargaining, but rather because they were considered the "first prerequisite" to a successful organization drive among the Company's nonmember Agents.

When, on August 23, 1967, the Union again requested that Prudential supply a list of names and addresses of Agents within the collective bargaining unit, the Union resurrected its assertion that it wanted the list in order to communicate with Agents in regard to matters relevant to collective bargaining. Prudential again refused to comply with the Union's request.

This refusal led to the decision and order of the National Labor Relations Board issued on November 13,

1968 which was enforced by the United States Court of Appeals for the Second Circuit with Judge Friendly dissenting on May 28, 1969.

REASONS FOR GRANTING THE WRIT

I.

The effect of the Board order that was sustained by the Court of Appeals is to require Prudential to assist the respondent Union in soliciting members from among Prudential's employees in order to strengthen the bargaining position of the Union as against Prudential.

The Board did "not dispute the fact" that the list of names and addresses of nonmembers of the Union which Prudential is required to turn over might be used by the Union "for the purpose of recruiting new members...." (App. 9a n. 11 *infra.*). The evidence that the Union would so use the mailing list is substantial and compelling. Indeed, Judge Friendly, dissenting below, thought it clear on the record that recruitment was the Union's only objective. (App. 32a *infra.*).

To the majority of the Court of Appeals, however, the fact that the Union would use the mailing list to solicit new members was "simply of no moment." (App. 29a *infra.*). Consequently, the court rejected Prudential's request that the Board's order be so written as to limit the Union's use of the mailing list to matters pertaining to collective bargaining and contract administration—the purpose for which the list was ostensibly requested.

Thus, the court below has decided that an employer may be made materially to assist a long-time incumbent union that has no rival for representation rights in sight, to strengthen its bargaining power by turning

over to it an employee mailing list that can and will be used for recruiting new members.

The decision of the Court of Appeals involves an important question of federal law that has not been and should be decided by this Court. The lower court has decided the question in a way, moreover, that is inconsistent with the principles of related decisions of this Court.

The circumstances under which an employer has a duty to assist—by granting access to his property—an organizing union in its effort to obtain representative status were delineated by this Court in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956). Likewise, the circumstances under which an employer has a duty to assist—by supplying requested information—the representative of his employees in the union's performance of its collective bargaining duties have often been stated by this Court. *See, e.g., NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB* v. *Woolworth Co.*, 352 U.S. 938 (1956). But the question of the circumstances, if any, under which an employer has a duty to assist the union that has represented his employees for many years in its efforts to recruit additional members has never been specifically considered by this Court.

The decision below is that an employer must help a union which for many years has represented his employees without challenge to unionize non-union employees and thereby enhance the union's bargaining power. No support is to be found for that decision in the opinions of this Court on which the Court of Appeals relied.

Unlike the instant case, both decisions of this Court cited by the Court of Appeals on this point—the *Bab-*

cock & Wilcox case and *NLRB* v. *Wyman-Gordon Co.*, 37 U.S. Law Week 4370 (April 23, 1969)—involved access to and use of an employer's property by a union *seeking* representative status. This difference alone is decisive.

Babcock & Wilcox imposes a duty on an employer, in appropriate circumstances, to make his property available to an organizing union for membership solicitation purposes so that his employees may have the opportunity guaranteed them by the Act to be exposed to the union's point of view and thus make an intelligent choice on the question of representation. But once a union has attained a representative status, this purpose of the Act is satisfied, and the employer's duty in this regard is discharged. Nothing in the purpose or policy of the law warrants a continuing invasion of an employer's property interests by a recognized union for the purpose of allowing the union to attempt to strengthen its bargaining power by solicitation of additional members.

The same considerations apply to the *Wyman-Gordon* decision, where it was held that an employer must make employee names and addresses available to unions prior to a representation election. Union possession of a list of names and addresses prior to a representation election serves the purpose of insuring that the employees may exercise a fair, free and informed choice in their selection of a bargaining representative. But nothing in the *Wyman-Gordon* decision suggests that, once the representation question is resolved, it is an unfair labor practice for the employer to refuse further affirmative assistance to the union in its effort to strengthen its bargaining position by recruiting additional members.

The holding of the court below is not only unsupported by the cases upon which it purports to rest, but indeed is basically inconsistent with the pertinent decisions of this Court. The Board concluded that an employer who refuses, among other things, to assist a union to obtain a more powerful bargaining position by increasing its membership violates his duty to bargain in good faith. It directed the employer to desist from his violation and give his aid to the union. The Court of Appeals affirmed. With the sanction of the court, the Board has thus placed its thumb on the scale balancing the relative bargaining power between a union and the employer with respect to substantive matters. This is what this Court admonished the Board not to do in *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965).

In the *American Ship Building* case the Board, acting on the theory that it was entitled to try to strengthen a union in collective bargaining, held unlawful a lockout by an employer that was designed to compel a union to accede to the employer's collective bargaining demands. This Court reversed and said:

> "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." 380 U.S. 316.

Similarly, the principle of *Scofield* v. *NLRB,* 394 U.S. 423 (1969), stands in opposition to what the Court of Appeals has ruled the Board may do. This Court there said that it could

> "discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." 394 U.S. 433.

In the instant case the collective bargaining agreement between Prudential and the Union dealt specifically with permissible means for the Union to solicit members. It was agreed that Prudential's property and the means of communication made available thereon would not be used for membership solicitation purposes. But the Board and the court below, after weighing the alleged interests of both parties, concluded that the Union should have access to Prudential's property for membership solicitation purposes. Thus the Board is allowed to strike a better bargain for the Union than the Union was able to strike for itself at the bargaining table.

The scope of the decision below requiring affirmative assistance by an employer to enhance a union's bargaining power materially alters the rights and obligations of both employers and unions in a critical area of labor-management relations. This Court should resolve the fundamental issue of whether an employer's duty to bargain in good faith includes an obligation to assist a recognized union in its membership solicitation activities in order to enhance its bargaining power.

II.

The rationale of the Board in issuing its order, and of the court below in sustaining it, was that the mailing list of employees was relevant to the Union's fulfillment of its duties as the bargaining representative of the employees. It was thus an unfair labor practice for the employer to withhold the list. The conclusion of the Court of Appeals that the order could properly be sustained on this ground raises three questions that should be considered by this Court.

1. The Court of Appeals held that no specific showing of relevance on the Union's part was needed—that the mailing list was presumptively relevant to the Union's bargaining duties. That holding represents an unwarranted extension of the doctrine of presumed relevance of information to bargaining duties as developed by other courts of appeals.

2. The lower court's holding that the Union's alternative means of communication with nonmembers were not adequate is inconsistent with this Court's decision in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956).

3. In its review of the record to determine whether substantial evidence underlay the Board's decision, the court below departed from the standard established by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950).

The three questions will be taken up in turn.

A.

The National Labor Relations Act does not expressly impose upon an employer any affirmative duty to make information available to a union. The Act does, however, require "good faith" bargaining. Thus, if the employer possesses, but refuses to supply the union with, information that the union needs in order to perform its collective bargaining duties, the employer has breached his duty to bargain in good faith. A union, however, is not entitled to all of the information it wants for any reason. Rather, the *sine qua non* of the employer's duty is the relevance of the requested information to collective bargaining.

Ordinarily, the union has the burden, as an initial matter, of demonstrating the relevance of the requested information by reference to the circumstances of the case and the use to which the union can and will put the information. However, with respect to certain limited types of information, the courts have developed a presumption of relevance which relieves the union of the necessity of showing relevance in each individual case and which makes an employer's refusal to supply this information a per se violation of his duty to bargain in good faith.

The difference between information which may be deemed presumptively relevant and information the relevance of which must be demonstrated by a union was most clearly articulated by the Third Circuit in *Curtis-Wright Corp.* v. *NLRB,* 347 F.2d 61 (3d Cir. 1965), as follows:

> "[W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as *such data concerns the core of the employer-employee relationship,* a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires." *Id.* at 69. [Emphasis added.]

Other courts of appeals have voiced essentially the same standard. *E.g., Boston Herald-Traveler Corp.* v. *NLRB,* 223 F.2d 58 (1st Cir. 1955).

Since information pertaining to wages or other mandatory subjects of collective bargaining would normally be of no use to a union *except* in connection with col-

lective bargaining or contract administration, the necessary rational connection between a known fact and the fact to be presumed is thus established. *See Morrison* v. *California,* 291 U.S. 82, 88-91 (1934). On the other hand, unlike information pertaining to wages, information which the Union needs only for the purpose of communicating by mail with nonmember employees does not concern "the core of the employer-employee relationship." Such information, rather, pertains to the relationship between employees and the Union and could at most be only indirectly relevant to collective bargaining.[1] Moreover, a union might actually intend to use such information for purposes other than those related to collective bargaining—*i.e.,* as in this case, solicitation of union membership—and thus there is no rational basis for the conclusion that the information is necessarily and presumptively relevant to collective bargaining.

The holding of the court below, by extending a presumption of relevance to information like that involved in this case, in effect disposes of the relevance requirement altogether. It thus cuts the embryonic cord between the statutory duty to bargain in good faith and the duty to provide information, and establishes the latter as a duty independent of any statutory predicate. This approach is clearly inconsistent with the holdings of other circuits and presents to this Court a conflict of substantial importance.

---

[1] There is a substantial question whether "indirect relevance" is sufficient as a matter of law to require an employer, as a part of his duty to bargain in good faith, to supply a list of names and addresses of nonmembers of the union.

B.

In holding that the mailing list was actually needed because the Union lacked alternative channels of communication on matters pertaining to collective bargaining and contract administration, the court below attempted unsuccessfully to follow the alternative-channels-of-communication rationale of *NLRB* v. *Babcock & Wilcox,* 351 U.S. 105 (1956). But its standard for determining the adequacy of alternative channels of communication was totally different from the controlling standard established by this Court in that case.[2]

As this Court noted in *NLRB* v. *United Steelworkers (NuTone),* 357 U.S. 357 (1958), unions are not necessarily entitled to "the use of every possible means of reaching the minds of individual workers." In *Babcock & Wilcox,* this Court held that an employer is not required to grant a union access to his property unless the employees are "beyond the reach of reasonable union efforts to communicate with them" by other methods. No such duty exists if "the usual methods of imparting information are available."

The "usual" methods of communication which this Court deemed adequate in *Babcock & Wilcox* included the distribution of literature to "some of the employees"; other contacts with "some of the employees"; the distribution of literature by mail to over 100 employees (approximately 20 percent of the employees in the unit); and advertised union meetings. *See* 351 U.S. at 107 n.1 and 111.

In the instant case, not only were the "usual" methods of communication available, but indeed addi-

---

[2] Judge Friendly's dissenting opinion below (App. 31a-32a *infra*) brings into sharp focus this error in the decision of the lower Court.

tional channels of communication were agreed upon by the parties in their collective bargaining contract. There is no evidence in the record to suggest why the Union, except for its own inertia, could not utilize its far flung local organizations to distribute literature outside most if not all of the Company's offices. By its own admission, the Union has used this "usual" method of communication only infrequently.

Likewise, the union already has a mailing list of approximately 57 percent of the Agents in the unit—an existing channel of communication which again the Union has not used although it now claims it cannot fulfill its statutory duties without a complete list.

The Union holds regular membership meetings throughout the bargaining unit, a channel of communication which could effectively be used to reach nonmembers if the Union invited them.

As the court below conceded, personal contacts between members and nonmembers on matters pertaining to the Union are an effective channel of communication in offices to which at least 87.6 percent of the Agents report.

On top of this, by contract the Union has the right to have grievance committees and to maintain a bulletin board[3] in every Prudential office.

---

[3] The right to have a bulletin board in every office alone should be sufficient to dispel any claim that the Union lacks alternative channels of communication. In Decaturville Sportswear Co. v. NLRB, 70 L.R.R.M. 2472 (6th Cir. 1969), the court refused to enforce that portion of a Board order requiring the employer to supply a list of employee names and addresses because "opportunity for reasonable access to the employees" was given in other provisions of the order, one of which granted the Union access to the Company's bulletin boards.

A comparison of the channels of communication available to the union in *Babcock & Wilcox*—which were held to be adequate—with the channels of communication available to the Union in the instant case—which were held to be inadequate—compels the conclusion that the Board and the court below applied a standard far different from that established by this Court.

C.

In *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1950), this Court held that:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

This is a case where the standard, if not misapprehended, has at least been grossly misapplied. The Board based important findings on no evidence at all—on totally unsubstantiated speculation, surmise and inference. The Court of Appeals nevertheless sustained the Board's order.

Most notably, there is no substantial evidence on the record as a whole to support the finding that the home addresses were sought by the Union for the purpose of communicating with employees about collective bargaining matters. All of the evidence points to a contrary conclusion. This was the ground of Judge Friendly's dissent in which he said that "[W]e engage in self-deception when we proceed on the basis that the

Union's real objective is what its request of Prudential professed." (App. 32a *infra.*).

Although the Union asserted, and the Board and lower court found, that the home addresses were requested for the purpose of communicating with employees about collective bargaining matters, there is *no evidence* to support this assertion, apart from the Union's own self-serving statements. Indeed, all of the evidence points to a contrary conclusion. The Union has always had a mailing list of from 55 to 57 percent of the employees in the unit, but the record does not show that it has ever used this list to communicate about collective bargaining matters. In the past the Union has tried to obtain nonmember names and addresses through its own members, and the Union has explicitly stated it desired this information in order to solicit union membership among these employees and thus strengthen its bargaining position. And finally the Union vigorously opposed Prudential's suggestion that the Union's use of the mailing list be limited to matters pertaining to collective bargaining or contract administration.

The finding that the alternative channels of communication, available to the Union through the contract or otherwise, were inadequate is also based on speculation. In its decision, the Board noted that "neither the grievance procedure nor the posting provisions [of the collective bargaining agreement] allow the Union to *communicate generally* with unit employees." (Emphasis added.) The Board apparently predicated this finding on the fact that the collective bargaining agreement regulates to some extent the kinds of materials that may be posted on the bulletin board. However, the ability of the Union to "com-

municate generally'' was completely immaterial to this case. The issue, rather, was whether the Union could communicate about collective bargaining and contract administration matters. But there is *not a shred of evidence* that the Union ever attempted to utilize the bulletin boards for conveying information regarding collective bargaining or contract administration matters or that Prudential has ever construed the contract as prohibiting the posting of matters pertaining to collective bargaining or, more important, that any arbitrator has ever sustained any such interpretation of the contract.

If the Board wished to rely on a notion of inadequacy of bulletin boards (or of grievance committees) as a means of communication regarding collective bargaining or contract administration matters, it had the burden of proving, at the very least, that the Union had attempted to utilize those means of communication and had been prevented from doing so because of a narrow interpretation of the contract by Prudential, or had been otherwise unable to do so. ***But no such proof was offered.***[4]

---

[4] There was likewise no substantial evidence to support the Board's statements regarding the ''unsuccessful'' efforts to communicate through handbilling, or the court's statements regarding the inadequacy of Union meetings as a means of communication.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME ACKERMAN
WILLIAM H. ALLEN
Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street
Washington, D. C. 20006

AUGUST 1969